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No. 09-657

IN THE

Supreme Court of the United States

BIRMINGHAM BOARD OF EDUCATION,
Petitioner,

v.

CATHY MCCORD-BAUGH,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is review by this Court jurisdictionally unavailable or inappropriate, given Petitioner's failure to raise the current issue on its appeal in the manner required by settled state procedural rules, and also by Petitioner's failure to raise that issue at trial?

2. If review on the merits is available, is the particular Equal Protection claim in this case barred by *Engquist v. Oregon Dep't of Agriculture*, ___ U.S. ___, 128 S.Ct. 2146 (2008)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
BRIEF IN OPPOSITION	1
STATEMENT	2
ARGUMENT	6
1. The Court may not have jurisdiction, and certainly should deny the Petition, because the Alabama Supreme Court did not decide the *Engquist* issue that the Board now presents.	6
2. The *Engquist*-related issue on the merits is more complex than the Board claims, and this Court should not be the first court in the nation to tackle it	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Branch v. Greene County Board of Education, 533 So.2d 248 (Ala. Civ. App. 1988)... 3-4
Ex parte Discount Foods, Inc., 789 So.2d 842 (Ala. 2001) 9
Engquist v. Oregon Dep't of Agriculture, ___ U.S. ___, 128 S.Ct. 2146 (2008)..... *passim*
Marsh v. Birmingham Board of Education, 349 So.2d 34 (Ala. 1977) 3-4
Ex parte McCord-Baugh, 894 So.2d 679 (Ala. 2004) 2, 4
Ex parte State Department of Revenue, 993 So.2d 898 (Ala. 2008) 5, 7-8
Village of Willowbrook v. Olech, 528 U.S. 562 (2000)..... 2-4, 10-11
Webb v. Webb, 451 U.S. 493 (1981)..... 8
Werner Beiersdoerfer v. Hilb, Rogal and Hamilton Co., 953 So.2d 1196 (Ala. 2006)..... 8
Yakus v. United States, 321 U.S. 414 (1944)..... 6-7

STATUTES

42 U.S.C. § 1983 2
Ala. Code § 12-2-13..... 9
Ala. Code § 16-22-10(f) 2, 10

RULES

Supreme Court Rule 14..... 7
Ala. R. App. P. 39 4

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BRIEF IN OPPOSITION

Respondent, Cathy McCord-Baugh, respectfully submits this brief in opposition.

Petitioner, Birmingham Board of Education, contends that the Alabama Supreme Court inexplicably rendered a decision on federal law that is directly contrary to *Engquist v. Oregon Dep't of Agriculture*, ___ U.S. ___, 128 S.Ct. 2146 (2008).

The reality is quite different: the Alabama Supreme Court could not and did not decide the *Engquist* issue that the Board presents in its Petition to this Court, because the Board failed to present that issue to the Alabama Supreme Court in the manner required by settled Alabama law. And the merits question, if it could be reached, would be

substantially harder than the Board suggests. This Court may not even have jurisdiction; in any event, the Court should deny the Petition.

STATEMENT

This case was filed ten years ago, by Cathy McCord-Baugh, an administrative employee of the Birmingham Board of Education. The case concerns her salary. Under Alabama law, school system salaries are not a matter of individualized managerial discretion, or of individual contracting. Instead, each system is required by law to follow a duly-adopted "salary schedule." *See, e.g.*, Ala. Code § 16-22-10(f) ("Each city and county board of education shall establish and maintain a written salary schedule for each class and type of employee.") McCord-Baugh claimed that, although she performed the job of community school coordinator and was recognized as such by the Board and its agents, she did not receive the salary set forth in the salary schedule for that position. She brought claims under state law, and under 42 U.S.C. § 1983 to enforce the Equal Protection clause of the Fourteenth Amendment.

The trial court granted summary judgment against McCord-Baugh. The Alabama Supreme Court reversed the summary judgment on the Equal Protection claim, and remanded the case for further proceedings. *Ex parte McCord-Baugh*, 894 So.2d 679 (Ala. 2004). The Alabama Supreme Court relied on *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). In *Olech*, this Court had reaffirmed the viability of "class of one" Equal Protection claims: claims based not on an allegation of class-based discrimination but on the assertion that the government had intentionally treated the plaintiff worse than it had treated

other similarly-situated persons, without a rational basis.

The case returned to the trial court, and went to trial. At trial, the Board did not argue that there could be no *Olech*-type "class of one" claim in the employment context. The Board could have made that argument on motion for judgment as a matter of law—even if the Board might have had to frame it as a contention that the Alabama Supreme Court should overrule its 2004 decision—but the Board chose not to do so. Instead, the Board's strategy was to accept the *Olech* "class of one" Equal Protection formulation as the governing law, and to argue that McCord-Baugh had failed to prove the elements required by *Olech*. The trial court denied the Board's motion, the jury found in favor of McCord-Baugh, and the trial court entered judgment on that verdict.

The Board appealed to the Alabama Court of Civil Appeals. Again the Board did not argue that there could be no "class of one" Equal Protection claim in the employment context. Instead, insofar as the Board challenged the merits of the "class of one" theory, it was again only a challenge to the sufficiency of the evidence under the *Olech* formulation. Brief of Appellant, in *Birmingham Board of Education v. Cathy McCord-Baugh*, No. 2050955 (Ala. Civ. App.), pp. 13-23. The Board also made a separate argument about the limits of *respondeat superior* liability, citing *Marsh v. Birmingham Board of Education*, 349 So.2d 34 (Ala. 1977) and *Branch v. Greene County Board of Education*, 533 So.2d 248 (Ala. Civ. App. 1988). Brief of Appellant in No. 2050955, pp. 24-28. Finally, the Board made a statute of limitations argument. *Id.*, p. 28.

The Court of Civil Appeals affirmed the judgment on the jury verdict, without opinion. [Pet. App. 1a].

The Board petitioned the Alabama Supreme Court for certiorari. Alabama Rule of Appellate Procedure 39(a)(1)(E) provides that one of the grounds on which certiorari can be sought is a request for the overruling of Alabama Supreme Court precedent. The Board chose not to include, in its petition to the Alabama Supreme Court, a request for the overruling of the 2004 decision in *Ex parte McCord-Baugh*. Instead, the Board raised two issues. First was the *respondeat superior*, or *March/Branch* issue, under the heading "The Unauthorized Actions of Employees of a Public School Board Cannot Bind the Board." Petition for Certiorari, in *Ex Parte Birmingham Board of Education*, No. 1061128 (Ala. S.Ct.), pp. 3-10. Second was the statute of limitations issue. *Id.*, pp. 10-12. The certiorari petition did not include any issue about the merits of the "class of one" theory—neither a contention that there could be no such claim in the employment context, nor even that McCord-Baugh had failed to prove the elements of such a claim under the *Olech* formulation. The Alabama Supreme Court granted the writ only as to the first issue, regarding *Marsh*, *Branch*, and the limits of entity liability under *respondeat superior*. [Pet. App. 35a].

Then this Court decided *Engquist*, and the Board tried to expand the issues in the Alabama Supreme Court based on *Engquist*. The Board did so by filing a *sui generis* motion styled "Motion to Vacate the Judgment of the Alabama Court of Civil Appeals and of the Trial Court and to Dismiss the Complaint." The Supreme Court of Alabama ordered the parties to file supplemental briefs "addressing the applicability and effect" of *Engquist*. [Pet. App. 37a].

In her supplemental brief, McCord-Baugh pointed out that the *Engquist* issue, or in other words the contention that there could be no "class of one" Equal Protection claim at all in the public employment context, was not properly before the Court, because the Board had not preserved that issue in the procedurally-required way. McCord-Baugh pointed out that the Board had not raised the issue at trial or in its post-trial briefing to the Court of Civil Appeals. McCord-Baugh also pointed out that the Board had not included the issue in its certiorari petition. McCord-Baugh cited caselaw, such as *Ex parte State Department of Revenue*, 993 So.2d 898 (Ala. 2008), holding that in certiorari review of a decision of an intermediate appellate court, the Alabama Supreme Court cannot entertain an issue that is not included in the certiorari petition. McCord-Baugh also pointed out that, on the merits, *Engquist* was distinguishable and should not be read so broadly as to extinguish her claim.

The Alabama Supreme Court agreed with McCord-Baugh that it was procedurally barred from reaching the issue of the viability of the Equal Protection claim on the merits, by virtue of the Board's having failed to include such an issue in its certiorari petition. This is clear from the fact that the Alabama Supreme Court cited one case in its no-opinion summary order quashing the writ of certiorari: *Ex parte State Department of Revenue*, 993 So.2d 898 (Ala. 2008), one of the very cases McCord-Baugh had cited as reflecting the settled law about such a procedural bar. [Pet. App. 36a]. The Board is silent about that crucial fact in its Petition to this Court.

It is, now, dispositively settled that the Board intentionally paid McCord-Baugh less than others

similarly situated, and that the Board had no rational basis for doing so. That is settled by the jury verdict and the affirmance thereof by the state courts, and the Board properly does not ask this Court to decide whether the jury was right about those facts.

ARGUMENT

1. The Court may not have jurisdiction, and certainly should deny the Petition, because the Alabama Supreme Court did not decide the *Engquist* issue that the Board now presents.

This is not a case of state court intransigence in the face of *Engquist*, as the Board contends. The Alabama Supreme Court did not "decide" any federal issue, as the Board claims, in the decision from which certiorari is now sought. *See* Petition at i, 7 (asserting that the Alabama Supreme Court "decided" the issue presented in the Petition). The Alabama Supreme Court did not reach any such issue because of a state-law procedural bar, attributable to the Board's own choice of litigation strategy. So this Court's jurisdiction is questionable at best. If there is jurisdiction, still the Court should not grant review because of this procedural posture.

The Board contends that an appellate court must apply the law as it stands when the court decides the case, even if that represents a change from the law as it stood when the case started. But this maxim always has a caveat, implicit at least: an appellate court does not have to decide an issue that was not preserved and presented to it in the proper procedural fashion. *See, e.g., Yakus v. United States*, 321

U.S. 414, 444-45 (1944).[1] This principle is reflected in this Court's Rule 14.1(g)(i), which requires special focus on ensuring that the issue at hand was properly presented and preserved below, in any case arising to this Court from state courts.

Here, the Alabama Supreme Court recognized that there was a firm and settled state-law procedural bar, by virtue of the Board's own choice of appellate strategy, that kept that Court from addressing the federal issue that the Board raises here. The Board had not raised the issue in its state law petition for certiorari. The Alabama Supreme Court therefore could not reach the issue, under authorities such as *Ex parte State Department of Revenue*, 993 So.2d 898 (Ala. 2008).

Moreover, the Board had not raised the issue in its appeal to the intermediate appellate court, the Court of Civil Appeals. And the Board had not raised the issue by motion for judgment as a matter of law in the trial court. *Engquist* had not yet been decided when the case was in those courts, it is true. But still the Board could have contended that it was entitled to judgment as a matter of law because there could be no "class of one" claim in the employment context. The Board chose not to make that argument, at trial

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[1] "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. . . . Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. . . . While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts . . ."

and on its appeal from the trial judgment. These litigation choices, too, would have been procedurally fatal to the Board under state law, even leaving aside the *State Department of Revenue* issue.

The failure to raise a federal issue in state court, "at the time and in the manner required by the state law," *Webb v. Webb*, 451 U.S. 493, 501 (1981), leaves this Court without jurisdiction; or if it is not truly a matter of jurisdiction it is nonetheless a reason for this Court to deny review based on principles of comity and judicial economy. *Webb*.

The Board might try to salvage its Petition by recasting it as a request for review of the decision that the Alabama Supreme Court rendered on the Equal Protection issue several years ago at the summary judgment stage. Any such effort would not be enough to solve the procedural—perhaps even jurisdictional—problems that stand in the way of review here.

Under Alabama law, a party that has lost at trial and wants to obtain a reversal of the trial judgment—based on a legal principle or a sufficiency-of-the-evidence argument—must preserve the point through a motion for judgment as a matter of law. In other words, after a trial, Alabama's appellate courts will not consider whether summary judgment was wrongly denied. *See, e.g., Werner Beiersdoerfer v. Hilb, Rogal and Hamilton Co.*, 953 So.2d 1196, 1205 (Ala. 2006). Thus an Alabama litigant who wants to continue to preserve a federal issue so as to overturn a trial judgment, after having failed to win on that basis on summary judgment, must continue to assert its position on the issue at trial and on subsequent appeal.

And indeed Alabama law explicitly provides that a decision rendered in a first appeal can be reconsidered in a later appeal in the same case. Ala. Code § 12-2-13. The Alabama Supreme Court has, when appropriate, reversed itself on a legal question in a subsequent appeal, where intervening legal changes show that the prior decision in the same case was wrong as a matter of law. *See, e.g., Ex parte Discount Foods, Inc.*, 789 So.2d 842, 846 & n.4 (Ala. 2001). So the Board had no excuse for failing to do what it could have done, to preserve this current issue for subsequent review at trial and on its appeal from the trial judgment.

Whether or not this aspect of Alabama procedure is strong enough to deprive this Court of jurisdiction, it is at least a consideration that should lead the Court to decline review as a matter of policy or discretion. This Court should not reverse a state court judgment based on a federal issue that the petitioner failed to raise in the proper way and at the proper time under state law.

2. The *Engquist*-related issue on the merits is more complex than the Board claims, and this Court should not be the first court in the nation to tackle it.

If this Court reached the merits, the case would involve a hard question about the meaning of *Engquist*, a question that (to our knowledge, and so far as the Petition shows) no court has addressed in any case like this one. Did *Engquist* truly abolish *all* "class of one" claims of every conceivable sort in the employment sphere? Or is it possible that some particular sorts of claims may survive, including the claim here? The question is not so extraordinarily

important that this Court should be the first to reach it.

We recognize that there are parts of *Enqguist* that seem to bar all "class of one" claims in employment. The first paragraph of this Court's opinion states, "We hold that such a 'class-of-one' theory of equal protection has no place in the public employment context." *Engquist*, 128 S.Ct. at 2148-49. The Court also made such seemingly categorical statements elsewhere. *Id.* at 2151, 2156.

But arguably the true meaning of *Engquist* is somewhat narrower, and the case bars "class of one" attacks only on those types of employment-related decisionmaking that are inherently case-by-case matters involving subjectivity, discretion and judgment. That narrower reading of *Engquist* is supported by this Court's reasoning. The Court reasoned that an *Olech*-type "class of one" claim is not suited to forms of governmental action "which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." 128 S.Ct. at 2154. The Court returned repeatedly and at length, *id.* at 2154-56, to this line of reasoning. This supports our view that, though some parts of the opinion speak broadly, *Enqguist* should best be read as barring "class of one" claims only for certain types of employment decisionmaking, those in which subjectivity and individualized judgment are inherent.

On that view of *Engquist*, McCord-Baugh's claim would survive, since the salaries of school system employees in Alabama are not a matter of subjective case-by-case discretionary decisionmaking. Instead, salaries are required by state law to be a uniform matter under a set "salary schedule" for each school system. *See, e.g.*, Ala. Code § 16-22-10(f). Therefore,

the reasoning of *Engquist* does not require an exclusion of this case from the general theory of Equal Protection that was reaffirmed in *Olech*. In this case, unlike the types of inherently individualized decisionmaking that were at the heart of *Engquist*, there is no reason to countenance intentional and arbitrary governmental departures from the constitutional norm of equal treatment. Here, in contrast to *Engquist*, there is a generally applicable baseline against which McCord-Baugh's treatment can be measured: it is the salary schedule. This case is, therefore, like those types of cases that *Engquist* recognized as being well-suited for the "class of one" Equal Protection theory. 128 S.Ct. at 2154-55. This case involves treatment that was supposed to be uniform, but government officials made an intentional and arbitrary departure from that norm of uniformity.

This question about how broadly to read *Engquist* is a real question, of at least some reasonable difficulty. But it is not a question that this Court should reach at this time. The Alabama courts did not decide it. The Board cites no decision from any other court in the nation that has decided it. It is not a particularly burning or vitally important question. This Court should not become the first court in the nation to wrestle with this rather esoteric question.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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